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No. 677

In the Supreme Court of the United States

October Term, 1952

JAMES WALTER McCORMICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE [illegible] CIRCUIT

BRIEF FOR THE [illegible]

[illegible]

[illegible]

[illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 677

JAMES WALDO MCCORMICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–10a) is reported at 309 F. 2d 367.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1962. A petition for rehearing was denied on November 19, 1962. By order of Mr. Justice Clark, the time for filing a petition for a writ of certiorari was extended to and including December 29, 1962. The petition for a writ of certiorari was filed on December 20, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's motion, made after conclusion of the testimony at the trial, to suppress evidence obtained under a search warrant was properly denied.

2. Whether the court of appeals properly took judicial notice of the laws of Maryland and Pennsylvania to determine whether they exempted petitioner from the provisions of 15 U.S.C. 1172, forbidding the interstate transportation of gambling devices.

STATUTE AND RULE INVOLVED

15 U.S.C. 1172 provides, in pertinent part:

> It shall be unlawful knowingly to transport any gambling device to any place in a State, the District of Columbia, or a possession of the United States from any place outside of such State, the District of Columbia, or possession: *Provided*, That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section.

Rule 41, F.R. Crim. P., provides in pertinent part:

> (c) ISSUANCE AND CONTENTS. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge

or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds of probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

* * * * *

(e) MOTION FOR RETURN OF PROPERTY AND TO SUPPRESS EVIDENCE. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that * * * (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued. * * * The judge shall receive evidence on any issue of fact

> necessary to the decision of the motion. * * * The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

Petitioner and a codefendant were charged by a two-count indictment with conspiring to transport slot machines in interstate commerce and with the substantive offense of interstate transportation of a described slot machine, in violation of 15 U.S.C. 1172 (A. App. 1–12).[1] After waiving a jury, both defendants were tried by the United States District Court for the Northern District of Illinois and found guilty as charged. Petitioner was sentenced to imprisonment for a period of eighteen months and the codefendant to imprisonment for six months (A. App. 4). Petitioner alone appealed. His conviction was affirmed (Pet. 1a–10a).

Count 1 of the indictment charged that between January 1958 and September 16, 1959, petitioner and John Earl Wilson conspired with one another and with Bernard Sutton, a co-conspirator but not a co-defendant, to transport slot machines from Chicago, Illinois, to Chambersburg, Pennsylvania, and to Hagerstown, Maryland, which states and cities did not then have in effect laws exempting them from the provisions of 15 U.S.C. 1172 (A. App. 10–12).

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[1] "A. App." refers to appellant's appendix in the court of appeals. "G. App." refers to the government appendix therein.

Count 2 of the indictment charged that on September 11, 1959, petitioner and codefendant Wilson transported and caused to be transported from Chicago, Illinois, to Hagerstown, Maryland, a described slot machine and that the State of Maryland did not then have in effect any law exempting that State or the City of Hagerstown, from the provisions of 15 U.S.C. 1172 (A. App. 12).

1. No motion to suppress evidence was filed before the trial, although petitioner's counsel stated, during the testimony of an F.B.I. agent, that he intended to file such a motion on the ground that the affidavit in support of the search warrant was based upon hearsay (A. App. 35–36). At the close of the government's evidence, petitioner moved for a judgment of acquittal on various grounds, none of which related to suppression of the evidence (A. App. 50–51). On November 13, 1961, the hearing of testimony was completed and the cause adjourned to December 13 for the court's finding and disposition (A. App. 3). On November 29, 1961, petitioner filed a petition to quash the search warrant and to suppress evidence (A. App. 3, 13–14) and a motion for judgment of acquittal (A. App. 3, 69). The motion was argued on December 13, 1961, but the petition to quash was not mentioned (A. App. 70–78). The trial court denied both the motion and the petition (A. App. 78).

The petition to quash the search warrant and to suppress evidence rested on the grounds (a) that the affidavit in support of the warrant did not state facts

sufficient to establish probable cause and was based upon hearsay, and (b) that the articles seized were not mentioned in the search warrant (A. App. 13–14). The affidavit of Richard H. Grabham, Special Agent, F.B.I., was as follows (A. App. 15–16):

> That he (is positive) that (on the premises known as) 1721 Philadelphia Ave., Chambersburg, in warehouse located at the rear of said premises in the Middle District of Pennsylvania, there is now being concealed certain property, namely Mills "QT" slot machine, serial number, 21387, located on base of said machine and contained in cardboard carton, with trademark "Container Corporation of America" and addressed to R. L. Horn, 816 West Church Street, Hagerstown, Maryland, from H. R. Brown, 4401 North Dover Street, Chicago, Illinois, to Hagerstown, Maryland, and from which are Hagerstown, Maryland, to Chambersburg, Pa., in McCormicks automobile, in violation of U.S. Code Title 15, Section 1172.
>
> And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:
>
> Affiant received information from Chicago Office of the F.B.I. that F.B.I. Agents were present when the above slot machine was shipped via Railway Express and placed proper identification upon said machine and package, and that F.B.I. Agents were present at Hagerstown, Maryland on September 14, 1959, and observed receipt of said slot machine in its container at the Railway Express Office at Hagerstown, Md., and observed James W. McCormick

placing said container in the trunk of his automobile and transporting it to Chambersburg, Pa., where he placed it within above described premises.

2. The evidence at trial may be summarized as follows:

James B. Sutton testified that from February 1957 until the end of 1959 he was employed by defendant John Wilson in the rebuilding of slot machines in Chicago, Illinois. In June 1958 Wilson received an order for machines from petitioner. On or about July 10, 1958, after a telephone call to James McCormick in Chambersburg, in which both Wilson and Sutton spoke to the party who identified himself as petitioner, they carried the machines (concealed under a boat on the top of a station wagon) to Chambersburg, and then unloaded them in a garage at the rear of the petitioner's home.

On four occasions between September 1958 and August 1959, Sutton (sometimes accompanied by Wilson) delivered more than 40 machines to petitioner; on two occasions he took machines back for repair (A. App. 21–22). At the time of the August 1959 delivery, petitioner gave Sutton five trade-ins and a little QT machine to take to Illinois for repair. Petitioner told Sutton to return the repaired machine to Mr. R. L. Horne, 816 Church Street, Hagerstown, Maryland (A. App. 22–23).

After Sutton's return to Illinois he received a visit from F.B.I. agent Webb. Thereafter, Webb marked the casting of the QT machine, identified as Govt. Exh. 15. On September 11, 1959, Sutton sent the

machine (which had been packed in Webb's presence) by Railway Express to the addressee previously named by Wilson in Chambersburg, mailed the receipt to petitioner, and called petitioner to tell him it was on the way (A. App. 23–24).

F.B.I. agent Grabham testified that at 7:45 p.m., September 14, 1959, he placed petitioner under arrest at his residence in Chambersburg and gave him a copy of the warrant to search the warehouse at the back of his house. Petitioner took Grabham and three other agents to the warehouse and pointed out the Mills QT slot machine described in the search warrant, which was on a bench. Two other slot machines were underneath the bench, and at the end of the warehouse there were fifteen other slot machines. After telling petitioner that he did not have to make a statement, Grabham asked him if he picked up the Mills QT machine in Hagerstown. Petitioner affirmed that he had, but denied having brought it to Chambersburg. Petitioner said that the other machines had not been imported from outside the State and were old machines which he had acquired before the Johnson-Preston Act was passed. Grabham took possession of the machines and brought petitioner before the United States Commissioner (A. App. 18, 30–31).

The next day, after Grabham told petitioner that he and other agents had followed petitioner from Hagerstown to Chambersburg, petitioner admitted that he drove the machine in the back of his car. He again denied that the other machines came from outside

the State, saying that they belonged to clubs in the vicinity.[2]

It was stipulated that the agent for the Railway Express Company at Hagerstown would testify that he delivered to petitioner the package marked Government's Exhibit 15a on September 14, 1959. Petitioner showed him the shipping receipt for the package and signed the name R. L. Horn, 816 Church Street, Hagerstown, Maryland. It was further stipulated that petitioner received the shipment on said date and brought it by automobile to a building located back of his home at 1721 Philadelphia Avenue, Chambersburg, Pennsylvania (A. App. 68–69).

ARGUMENT

1. The trial court properly denied petitioner's motion to suppress.

a. Petitioner made no attempt to comply with the requirement of Rule 41(e), F. R. Crim. P., that such a motion be made before trial "unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion." Throughout the two-year period between the return of the indictment and the trial of the case, the language of the affidavit and the nature of the property seized were fully known to petitioner. Yet, it was only toward the close of the

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[2] On rebuttal, a brother in law of Sutton testified that he accompanied Sutton and petitioner in the station wagon when they went to petitioner's home in July 1958 with slot machines and a boat on top of the car (A. App. 63–64). A check for $1,125, dated March 7, 1959, from petitioner to codefendant Wilson and endorsed by him was identified (A. App. 14–15, 21, Govt. Exh. 20).

government's brief presentation that petitioner expressed an intention to file a motion to suppress all the government exhibits on the ground that the affidavit was based on hearsay (*supra*, p. 5). The matter was not mentioned again during the trial nor evidence offered with respect to it. Two weeks later, petitioner filed his motion to suppress (A. App. 13–14), which was denied without comment or discussion (A. App. 69–78). It is quite possible that the trial court denied the motion on the ground that it was filed too late.

b. In any event, the motion to suppress was properly denied on the merits. The affidavit of agent Grabham established that he had been informed by the Chicago F.B.I. that agents had been present when the package containing the slot machine was shipped by American Express, that they had marked the package, and that other agents had seen petitioner pick up the package in Hagerstown and drive to his premises.[8] That the initial information as to the ship-

[8] Petitioner argues that the affidavit was false in stating that affiant "received information that F.B.I. agents were present when the above slot machine was shipped via Railway Express and placed proper identification on said machine and package" and that "F.B.I. agents were present in Hagerstown, Maryland, on September 14, 1959, and observed receipt of said slot machine in its container" (Pet. 16). The evidence was that agent Webb made a distinctive marking on this machine about a month before it was shipped and was personally present when it was crated and shipped via Railway Express. As to the second allegation, the affidavit was that affiant and other agents were present when the package bearing all the distinctive markings described by Webb arrived in Hagerstown, where petitioner picked it up (*supra*, pp. 6, 7). Complete grammati-

ment from Chicago might technically be hearsay does not determine the question of probable cause. *Jones* v. *United States*, 362 U.S. 257. Nor does the fact that this information originated in Chicago cast doubt on the affiant's statement that he was positive the machine was in petitioner's house, since it was confirmed by the observations of the agents who saw petitioner pick up the package, load it in his automobile, and drive it to his premises. Although a magistrate must reasonably conclude that the affidavit has sufficient basis in the circumstances alleged, he need not find that the officer already has legally admissible evidence which is so conclusive of guilt that there is no longer need for making the requested search. See, as to the requirements for such an affidavit, *Batten* v. *United States*, 188 F. 2d 75 (C.A. 5); *Jacobs* v. *United States*, 24 F. 2d 890 (C.A. D.C.); *Fry* v. *United States*, 9 F. 2d 38 (C.A. 9); *United States* v. *Daniels*, 10 F. R. D. 225 (D. N.J.); *United States* v. *Tolomeo*, 52 F. Supp. 737 (W.D. Pa.)

c. Petitioner also contends that the seizure of machines not described in the search warrant was invalid. Since the substantive count, based on the shipment of the QT machines described in the warrant, is alone sufficient to support the verdict, the contention has no significance. It is, in any event, without merit. Reliance is placed upon the officer's conclusory statement, on cross-examination, that he

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exact accuracy in every detail will seldom be achieved in such matters. Here the language used was a substantially accurate and completely fair statement of the facts.

seized these machines by virtue of the search warrant (A. App. 35). The testimony shows, however, that petitioner had already been arrested before the machines were found. The officers were properly on the premises, making a valid arrest and seizure. In plain sight, visible without ransacking, rummaging, or indeed any search at all were a number of gambling machines which the officers had probable cause to believe had been transported in interstate commerce. The machines were also contraband under Pennsylvania law, 18 Pennsylvania Statutes, sec. 4603; *Commonwealth* v. *Cancillieri*, 166 Pa. Super. 1, 70 Atl. 2d 669. The seizure was therefore proper.

2. The court of appeals properly took notice of the laws of Pennsylvania and Maryland to determine whether they contained an exemption from federal law which should be recognized under the proviso of 15 U.S.C. 1172. It was early determined that, since the judicial power of the federal government extends to many cases arising under the laws of the various States, federal courts will take judicial notice of State law. *Owings* v. *Hull*, 9 Peters 607, 625. In a trial before the court without a jury, there would be no need to offer proof of nonexemption regardless of who had the burden of proof. The conclusion of the court of appeals that neither the law of Pennsylvania (18 Pennsylvania Statutes, sec. 4603; *Commonwealth* v. *Cancillieri*, 166 Pa. Super. 1, 70 Atl. 2d 669) nor the law of Maryland (27 Ann. Code of Maryland, sec. 237, *North Beach Amusement Company* v. *United States*, 240 F. 2d 729 (C.A. 4)) cre-

ates such an exemption is undoubtedly correct. Petitioner's contention that Maryland does not include slot machines within its definition of gambling devices overlooks 27 Ann. Code, sec. 244. Indeed, far from providing an exemption to 15 U.S.C. 1172, the statutes of these two States themselves contain prohibitions against the operation of slot machines (with certain exceptions in Maryland not here applicable).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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